IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.84 OF 1995

Shri D.T. Tare
Asstt. Collector (P)
Central Excise & Customs, Pune ..Appellant
(Org.Complainant)

Vs.

1. Ankush Rajaram Gogawale
age about 48 years,
Occupation : Agriculturist,
Gogalwadi, Post Velu
Taluka Haveli, Dist. Pune

2. Rajaram Rama Gogawale
age about 87 years,
Occupation: Agriculturist,
Gogalwadi, Post Velu,
Taluka Haveli, Dist. Pune.

3. The State of Maharashtra ..Respondents
(Nos.1 and 2 -
org.accd.nos.1
and 2)

Mr. D.N. Salvi for Appellant.
Respondent No.1 served.
Mr. Arfan Sait, Advocate appointed for Respondent No.2.
Mr. F.R. Shaikh, APP for Respondent No.3-State.

CORAM: S.S. PARKAR & ANOOP V. MOHTA, JJ.

Date : January 17, 2005.

ORAL JUDGMENT (PER S.S. PARKAR,J.):

1. This appeal is filed by the original complainant challenging the Judgment and Order dated 5/5/1993 delivered by the Additional Sessions Judge, Pune acquitting respondent nos.1 and 2 - original accused nos.1 and 2 of the offences under the provisions of the NDPS Act and Under Sections 66(1)(b)

and 81 of the Bombay Prohibition Act in Sessions Case No.557 of 1991.

2. Briefly stated the prosecution case is as follows:-

. On the basis of information, the officers of Central Excise and Customs Collectorate, Pune had carried out search in the residential premises of accused no.1 situated in agricultural land bearing Gat No.29 in the presence of panchas. Accused no.1 was present at the time of the search. During the search, there was recovery of 166 cannabis plants valued at about Rs.40,000/-. The said search had taken place on the night of 16/4/1991. The contraband was seized under the panchanama and the samples were sent for analysis to the office of C.A. The statements of accused nos.1 and 2 were recorded under Section 67 of the NDPS Act. After completion of the investigation charge-sheet was filed against accused nos.1 and 2. Accused no.2 was impleaded as an accused because the land in question happened to stand in his name, while accused no.1 was allegedly cultivating cannabis in the said land. After completion of investigation complaint was filed and the charges were framed against both the accused for offences under Sections

8(c), 10, 20(a)(i), 22(a)(i), 25 and 29 of the NDPS Act and under Sections 66(1)(b) and 81 of the Bombay Prohibition Act, to which both the accused pleaded not guilty.

3. On behalf of the prosecution 8 witnesses were examined, including the officers of the Central Excise who had participated in the raid and the officer who had issued search order under the provisions of the Act, so also panch to the seizure and the brother and cousin of the accused no.1 to establish that the land in question was at the relevant time in possession of accused no.1. The defence of the accused was of denial. Accused no.2 i.e. father of accused no.1 had stated in his 313 statement that the land in question had been allotted to the share of accused no.1 who was in possession of the land and he himself was residing at some other place with his other son. He pleaded ignorance about the use of the land for growing ganja. So far as accused no.1 is concerned, his case is that he was only residing in the said village but he was not concerned with the field and the plants were uprooted by him from percolated tank at the behest of the officers who were armed with pistol and sticks and his signature was obtained on the seizure panchanama. According to him after the water had dried up in the

percolated tank number of plants grew in the percolated tank and the area of the land, where the Nilgiri trees and Mango trees are grown, is in his possession. In his written statement accused no.1 has stated that there is figs garden in the percolated tank which is Gat No.29 which was acquired by the Government on 25/2/1992.

4. After considering the evidence on record, the Sessions Court acquitted both the respondents-accused of the offences with which they were charged. The said order of acquittal is impugned in this appeal filed by the original complainant.

5. Mr. Salvi appearing for the appellant has contended that the officers of the Excise Department, who were also the authorised officers under the provisions of the Act, had visited the place on the basis of the information received by them that accused no.1 was growing ganja in the land in question. According to him the farm was in occupation of accused no.1 and at the time of raid and search accused no.1 was present in his house and it was he who had uprooted the plants and handed them over to the officers and therefore, possession of accused no.1 in respect of ganja plants is proved. The accused no.1

has also admitted in his statement that he was himself addicted to consume ganja. Moreover, no other person is stated to be in possession of the land in question. Mr. Salvi has also relied on the presumption under Section 35 of the NPDS Act and argued that the said presumption has not been rebutted by the accused no.1 showing that the land in question was in possession of some other person, except saying that the plants were uprooted from the percolated tank area which was acquired by the Government.

6. The trial court has acquitted the respondents-accused mainly on three grounds. Firstly, the trial court has held that there was non-compliance of the provisions of Section 42 of the NDPS Act. Secondly, it is held that there was non-compliance of Section 57 of the NDPS Act. Lastly it is held that the land in question is not shown to be owned by accused no.1. So far as accused no.2 is concerned, the trial court has referred to the admissions of the prosecution witnesses and has held that neither his possession of land nor his knowledge of cultivation of cannabis plant in the land in question has been proved by the prosecution.

7. Accused no.2, who is the father of accused

no.1, has relied on the Deed of Partition dated 19/10/1990 which is produced at Exhibit 26 on record. According to the said Deed 20 gunthas of land out of Survey No.29 was allotted to accused no.1 as his share in the agricultural lands of the family. Moreover, prosecution has also examined Shankar Gogawale as PW 7, who is the brother of accused no.1. He has stated that 20 gunthas of land is in possession of accused no.1 Ankush. He has also produced Partition Deed Exh.24 which bears his signature. He has proved Partition Deed Exh.26 allotting the land in question to the share of accused no.1 Ankush. The prosecution has also led evidence of PW 8 Dnyandeo Gogawale, who is the adjoining land holder and also cousin of accused no.1. He has deposed that accused no.2 resides with his son Shankar i.e. PW 7 while accused no.1 Ankush resides in the hut which is situated in Gat No.29. Thus, the say of accused no.2 and the evidence of PWs 7 and 8, brother and cousin respectively of accused no.1 shows that accused no.1 was allotted land in Gat No.29 and he was in occupation of the said land and he was residing in the hut which is situated in the said Gat No.29. The aforesaid evidence clearly shows that accused no.2 who is a pretty old man, stated to be about 87 years old in the trial court at the time of the seizure which

took place in the year 1991, has no concern either with the land or the plantation grown in the said land. Accused no.2 was residing with his another son Shankar PW 7 and he being very old person he must not be cultivating the said land. Accused no.2 appears to have been impleaded as an accused because the land in question continued to stand in his name in 7 x 12 extract.

8. The trial court has referred to the admission of PW 2 Tonpe that accused no.2 was never arrested in this case right from the date of seizure i.e. 16/4/1991. The panchas have stated that accused no.2 had no concern with the plants. PW 3 Police Patil Kondiba has also stated that due to his old age accused no.2 had not been cultivating the field since last 10 years. PW 5 Rajput who is the Superintendent of Central Excise has also stated that accused no.2 is like a retired person. Similarly, reference is made by the trial court to the evidence of Talathi Pasalkar PW 6 who has deposed that in the relevant year 1991 it was accused no.1 who was in actual possession of the land. Similarly PW 8 Dnyandeo who is the cousin of accused no.1 and also the adjoining land owner has deposed that due to old age accused no.2 had not been cultivating land since previous 10 years. Though the

land stands in the name of accused no.2 and he having allotted the said land bearing Gat No.29 to the share of accused no.1, there was no question of his using or even allowing his land for use of cultivation of ganja and, therefore, Section 25 of the Act would not be applicable. Even Section 46 of the Act does not caste any obligation on accused no.2 as a holder of land to give information to the authorised officer in respect of illegal cultivation of opium or cannabis plant etc. on his land unless he had knowledge about it. There is nothing brought on record by the prosecution on the basis of which even the knowledge of accused no.2 that the land in question was being used for the said purpose can be inferred, the land having been allotted to the share of accused no.1, though it stands in the name of accused no.2. In the aforesaid circumstances we have no reason to interfere with the acquittal of accused no.2 recorded by the trial court.

9. So far as offence of conspiracy under Section 29 of the Act is concerned, the same is also not proved as the knowledge of accused no.2 in respect of the use of the land in question for growing ganja plantation is not proved. As it is, accused no.2 was residing with his another son and due to his old age he was neither cultivating the land nor there is any

circumstance brought on record to infer that the land was being cultivated for the said purpose with his knowledge or consent. The offence of conspiracy, therefore, cannot be said to have been proved by the prosecution.

10. As regards accused no.1, it is necessary to deal with the three main grounds on the basis of which the trial court had acquitted him.

11. So far as compliance of Section 42 is concerned, PW 2 Inspector Tonpe has deposed that in the afternoon of 16/4/1991 when he was on duty he received information against accused no.1 that he had planted about 150 ganja plants in his field which is in his occupation. As per the information those ganja plants were planted in figs garden in the midst of figs trees. The said information was reduced to writing and sealed in a packet. He went for verification and after verifying it he had given report to Director of Revenue Intelligence which is produced at Exh.13. The copies of the said report were given to different officers. He had also given report to the Asstt. Collector along with sealed packet which mentions the name of the informant which is produced at Exh.14. Thereafter he along with

Asstt. Collector and other staff members and the panchas went in a jeep to the place of offence. His evidence has been corroborated by the Asstt. Collector Tare who was examined as PW 1. He has deposed that on the date of seizure he was on duty. Four Superintendents and 20 Inspectors were working under him. He has also corroborated the evidence of Inspector Tonpe PW 2 that he was informed by him about the information in respect of the cultivation of ganja plants by accused no.1. He thereafter passed on the said information to the Addl. Collector, Preventive and issued search authorisation dated 16/4/1991 under Section 41(2) which is produced at Exh.10 on record, pursuant to which the officers had gone to the place of incident for making search. It is pertinent to mention that PW 1 Tare was the member of the raiding or search party. In view of the search warrant issued by the higher officer Tare in the name of Inspector Tonpe and in view of the fact that Asstt. Collector Tare himself was a member of the raiding party, compliance with the provisions of Section 42 cannot be doubted or questioned. The trial court, therefore, was absolutely wrong in holding that there was non compliance of Section 42 of the Act.

12. So far as the compliance with Section 57 of

the Act is concerned, Rajput, the Superintendent of Central Excise, who was examined as PW 5, had taken over investigation from PW 2 Tonpe. He has deposed that after the arrest and seizure was made he had forwarded his report dated 17/4/1991 in Form No.F which is produced at Exh.29. This report mentions all the particulars including the name of the accused, his arrest and the contraband seized from accused no.1. Inspite of the compliance of the provisions of Section 57 of the Act, the trial court has surprisingly observed that there is no full compliance of Section 57 of the Act. Section 57 of the act requires that whenever arrest and seizure is made under the provisions of the Act report has to be sent to the Superior Officer within 48 hours, next after such arrest or seizure. The seizure had taken place on the night of 16/4/1991 and the report Exh.29 in Form No.F was submitted to the Superior Officer by PW 5 Rajput on 17/4/1991 i.e. within 24 hours after the seizure and arrest. From the perusal of Exh.29 it is quite clear that all the required particulars were mentioned in the said report and, therefore, trial court was wrong in observing that there was no strict compliance of Section 57 of the Act.

12. Lastly, the trial court has held that

prosecution has not proved the ownership of the land in question of accused no.1 nor it has proved that the plants were uprooted from the portion of the land which was in occupation of accused no.1 on the ground that it was the defence of the accused no.1 that the plants were uprooted from the portion of the land which was acquired by the Government and not from the portion of the land which is in his occupation. According to accused no.1 he was working as a driver and used to leave his house in the morning and return in the night and the plants were uprooted by him at the behest of the officers at the time of search. As pointed out earlier, accused no.1 was residing in the hut or farm house situated in the agricultural land bearing Gat No.29. The case of accused no.2, who is the father of accused no.1, is that 20 gunthas of land out of Gat No.29 was given to the share of accused no.1 in the Partition Deed. This is also supported by his another son Shankar i.e. the brother of accused no.1. Shankar has also relied on a document to show that the land in question bearing Gat No.29 was allotted to the share of accused no.1. Similarly the adjoining land owner PW 8 has also deposed that the said land was being cultivated by accused no.1 and not by accused no.2. The only question is whether the plants had grown in the portion of the land which was

allotted to accused no.1 or from the land which was acquired by the Government. In the statement of the accused no.1 recorded under Section 313 of Cr.P.C. it is his case that he was in the hut at the relevant time when the officers had visited his place and he was forcibly taken to percolated tank and was asked to uproot the plants which were in the percolated tank and obtained his signature on the seizure panchanama and that he had no concern with the fields from where the plants were uprooted.

14. Now it is pertinent to mention that percolated tank was part of the same Gat No.29 which seems to have been given number as 29-B after that portion was acquired by the Government. There was no other person in occupation at the relevant time of the said Gat No.29. Since it is the case of the accused no.1 that he had uprooted those plants, the onus was on him to show that he was not in possession of those plants. Even the percolated land was adjoining to the portion of Gat No.29 which was allotted to accused no.1. He has not shown that any other person had planted or was in occupation of the land having percolated tank. It is the case of the prosecution that those plants were planted in the midst of fig trees. However, accused no.1 in his 313 statement stated that he had grown

Nilgiri and Mango trees in the portion of the land allotted to him. The figs trees and cannabis plants cannot grow of their own unless they were planted by somebody. One of the grounds on the basis of which the trial court has given benefit to the accused no.1 is that since the plants were not cultivated in a row or planted in a row it cannot be said that accused had cultivated the land but it may be a case of natural growth of those plants. He has also referred to the height of the plants, some of which were six inches high while others four feet high and, therefore, according to the trial court it was not the case of normal cultivation. The trial court has observed that if the particular crop is cultivated in the normal course it should be in rows or at least of the same height. We cannot agree with such reasoning of the trial court. The accused might have done plantation in the midst of other trees so that it could not be noticed easily by others and create the impression that there was regular and actual cultivation of the said plant by accused no.1.

15. There is evidence of PW 6 Pasalkar, Talathi stating that crop shown for 1990-91 were for figs, tomato, pavta, sitafal etc. The case of the prosecution is that these plants had grown in the

midst of fig trees. However, the accused no.1 has denied that and has stated that he was having only Niligiri and Mango trees. Thus the prosecution case is also supported by the evidence of Talathi that accused was growing figs. But the trial court has relied on the evidence of the Talathi who does not show the crop of cannabis or ganja plantation in the official record. In our view, the reasoning of the trial court is against the evidence on record so far as the contravention of Section 20 of the Act is concerned. The prosecution has clearly proved the guilt of the accused no.1 for committing offence under Section 20 read with Section 8(c) of the Act. The accused no.1 has failed to rebut the presumption under Section 35 of the Act about his possession of the ganja plants, in whichever land he might have grown them. Simply because he states that the plantation was in the portion of the percolated tank the possession of the accused no.1 in respect of ganja plants cannot be said to have been rebutted by him.

16. In view of the above, accused no.1 is liable to be convicted for offence under Section 20 read with Section 8(c) of the NDPS Act under which the maximum sentence is of five years and fine upto to fifty thousand rupees. Seizure is of the year 1991 and it

is pointed out that initially as an under trial prisoner the accused no.1 was in custody for a period of two months and thereafter during the pendency of appeal in this court for a period of about one year. In view of the above accused no.1 can be sentenced to imprisonment already undergone by him and by imposing fine on him. There is no necessity to convict accused no.1 under the provisions of Sections 66(1)(b) and 81 of the Bombay Prohibition Act also now after a passage of fourteen years when he is convicted under the provisions of the NDPS Act.

17. In the result, this appeal is partly allowed. The order of acquittal of respondent no.2- original accused no.2 is confirmed. The bail bond of respondent no.2 shall stand cancelled.

. So far as the respondent no.1 - original accused no.1 is concerned the order of his acquittal is confirmed except for the offence under the provisions of Section 20 read with Section 8(c) of the NDPS Act. The respondent no.1-original accused no.1 is convicted for the offence under Section 20 read with Section 8(c) of the NDPS Act and sentenced to imprisonment already undergone by him and to pay a fine of Rs.1000/- in default to undergo imprisonment

for one month. The amount of fine shall be paid within four weeks from today. The bail bond of respondent no.1-original accused no.1 shall be cancelled after payment of fine amount.

. The appeal is disposed of accordingly.

(S.S. Parkar, J.)

(Anoop V. Mohta,J.)